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IN THE

Supreme Court of the United States

October Term, 1954

No. 735

JANE FROMAN,

Petitioner,

v.

PAN AMERICAN AIRWAYS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Petitioner herein prays for a Writ of Certiorari to review the order and judgment of the Court of Appeals and of the Appellate Division of the Supreme Court, First Department, State of New York.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28, Sec. 1257 (3) of the United States Code.

The Court of Appeals of the State of New York, the Court of last resort in the State of New York, affirmed an order of the Appellate Division of the Supreme Court, First Department which affirmed an order of the Supreme

Court of New York County, which order passed upon a claim involving a right, privilege and immunity arising out of a Federal Treaty commonly called the "Warsaw Convention", printed in full in 49 U. S. Stat., pt. 2, pp. 3000 *et seq.*, which regulates and limits liability of air carriers engaged in "international transportation," as defined by said "Warsaw Convention".

The "Warsaw Convention" was adhered to by the United States on June 27, 1934, subject to a reservation, "That the first paragraph of Article 2 of the Convention shall not apply to international transportation that may be performed by the United States Government" (49 U. S. Stat. part 2, p. 3013).

The orders and judgment sought to be reviewed granted summary judgment for defendant, dismissing the first cause of action seeking recovery of $1,000,000. under the laws of Portugal, the place where the crash occurred and injuries were sustained, confining plaintiff's suit to the expressed limitation provisions of the "Warsaw Convention".

A final judgment was entered after trial, upon defendant's motion in favor of plaintiff for the sum of $8,291.87 on July 3, 1953, which finally determined plaintiff's right in the suit. The final judgment was affirmed by the Appellate Division on November 19th, 1954 and leave to appeal to the Court of Appeals was denied on February 28, 1955.

A certified copy of the remittitur of the Court of Appeals upon the order sought to be reviewed, the order of the Appellate Division making said order of the Court of Appeals its order and certified copies of the final judgment together with the order of affirmance of the Appellate Division and the order of the Court of Appeals denying leave to appeal are submitted.

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Opinions Below

The opinion of the Court of Appeals reported at 299 N. Y. 88, is appended.

The memorandum decision of the Appellate Division (Rec., p. 77), reported in 274 App. Div. 767, 80 N. Y. Supp. (2nd) 735, is appended.

The opinion of the Supreme Court, Special Term, dismissing the plaintiff's first cause of action (Rec. pp. 66-7), reported in 190 Misc. 974, 77 N. Y. Supp. (2nd) 257, is appended.

Portions of the Warsaw Convention Involved

Article 1. "(1) This Convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire * * *."

"(2) For the purposes of this convention the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention."

Article 2. (1) This convention shall apply to transportation performed by the State or by legal entities constituted by legal law provided it falls within the conditions laid down in Article 1."

United States Reservation to Article 2 (1)

"Subject to reservation as is provided for in additional protocol that the first paragraph of Article 2 of the Convention shall not apply to international transportation that may be performed by the United States of America".

Article 3. "(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

"(a) The place and date of issue;

"(b) The place of departure and of destination;

"(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

"(d) The name and address of the carrier or carriers;

"(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

"(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which

shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

Article 22. "(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs."

* * * * *

"(4) The sum mentioned above shall be deemed to refer to the French francs consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths.

These sums may be converted into any national currency in round figures."

Statement

Plaintiff a passenger on the airship "Yankee Clipper", was injured during the crash of said airship in the Tagus River at Lisbon, Portugal, on the 22nd of February, 1943. She commenced suit in the Supreme Court, State of New York against the defendant, the owner and operator of the airship alleging that under the laws of Portugal the defendant was liable for all material, monetary and moral damages resulting from such crash, unless the defendant proved that the crash was not due to its fault or negligence (fol. 138). An additional cause of action alleged, that the crash of the airplane was due to the willful misconduct of defendant (fol. 145).

Defendant answered, and by way of affirmative defense alleged (fols. 159-182), that plaintiff's passage was governed by the "Warsaw Convention"; that in the trans-

portation of the plaintiff, defendant's liability was limited to the sum of $8,291.87 for personal injuries; that plaintiff and defendant entered into a contract for "international transportation" evidenced by a passage ticket in writing, for round trip passage from New York with stop-overs at several ports, with the final place of destination as New York; that defendant complied in all respects with the terms and provisions of the "Warsaw Convention", claiming exemption and limitation of liability thereunder.

Defendant moved for summary judgment to dismiss the first cause of action upon the ground that there was but one cause of action available to plaintiff, namely, under the provisions of the "Warsaw Convention" and not under the laws of Portugal.

The affidavit of defendant's traffic representative does not claim that a ticket was ever purchased by plaintiff for such transportation, nor, that a contract was ever delivered to her (fols. 66-69).

Plaintiff alleged that she did not contract, nor pay for such passage; that she did not receive any ticket calling for "international transportation"; that her passage was purchased by the United States Government under an arrangement with the U.S.O., to provide entertainment for our armed forces; that the passage was a military secret and that its destination was not disclosed to her until after the plane had departed; that she had no knowledge of the ticket provisions or its purported limited liability provisions (fols. 117-120). Her allegations in every respect were corroborated by the representative of the U.S.O. (fols. 125-130) and were not controverted by defendant.

Questions Presented

1. Are the provisions of the "Warsaw Convention" (Arts. 1, 3) regulating contracts for "international trans-

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portation" and the carrier's limitation of liability, applicable as a matter of law, to petitioner, who never contracted for such passage and to whom a ticket was never delivered; but who took passage after a ticket in her name was issued without her knowledge or consent?

2. Can it be said as a matter of law, that the government of the United States was not performing plaintiff's transportation within the meaning of the reservation to Article 2, paragraph 1 of the Convention?

3. Upon the proof submitted by this record, was a triable issue raised, as to whether the limitation provisions of the "Warsaw Convention" applied?

Reasons for Granting Writ

(1)

The policy of this Court is to review and independently determine all questions in which a federal right is necessarily involved concerning important public issues.

U. S. v. *Pink*, 315 U. S. 203, 217;
Ancient Egyptian Order v. *Michaux*, 279 U. S. 737, 744;
Dyer v. *Sims*, certiorari granted, 340 U. S. 809; Reversed and remanded, 341 U. S. 22;
Buthe v. *Denis*, 133 U. S. 514.

(2)

The Court of Appeals of the State of New York has erroneously interpreted and applied Articles 1 and 3 of the "Warsaw Convention" and the United States reservation to Article 2, paragraph 1, granting defendant immunity under the terms of the convention.

(3)

That the question and right so determined is one of substance and of great public interest.

(4)

That the question has not heretofore been passed upon by this Court.

* * * * *

(5)

Petitioner herein relies upon the dissenting opinion of Judge Conway (Appendix pp. 21-38), to demonstrate error and need for granting this petition to review.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Dated: April 15th, 1955.

Respectfully submitted,

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APPENDIX

Prevailing Opinion of Court of Appeals

Reported 299 N. Y. 88

Ellen J. Ross, Known Professionally as Jane Froman, Appellant, et al., Plaintiffs, v. Pan American Airways, Inc., Respondent.

APPEAL, by permission of the Appellate Division of the Supreme Court in the first judicial department, from an order of said court, entered June 29, 1948, which affirmed, by a divided court, an order of the Supreme Court at Special Term (Botein, J.; opinion 190 Misc. 974), entered in New York County, granting a motion by defendant for summary judgment under rule 113 of the Rules of Civil Practice dismissing the first cause of action set forth in the complaint. The following questions were certified:

"1. Upon the record here, should the defendant's motion for summary judgment be granted and the first cause of action dismissed?

"2. Upon the record here, has the plaintiff shown sufficient evidence to create a triable issue of fact?

"3. Was Mr. Abraham of the U. S. O. Camp Shows, Inc. an agent of the plaintiff-appellant, authorized to receive a ticket on her behalf, for international transportation under the Warsaw Convention?

"4. Was the plaintiff-appellant's transportation, alleged in this action, performed by the United States government, within the meaning of the Warsaw Convention, so as to exclude such transportation from the application of the limitation provision of the Warsaw Convention?"

Irving Lemov and Michael Halperin for appellant.

Donald Havens and Spencer V. Silverthorne, Jr., for respondent.

Desmond, J. Plaintiff-appellant, a passenger on one of defendant's trans-atlantic airplanes, was injured when the plane crashlanded in the Tagus River, near Lisbon, within the Republic of Portugal. Of her complaint against defendant, the first cause of action only is before us on this appeal, since that cause of action was dismissed at Special Term and the Appellate Division affirmed that dismissal and granted plaintiff leave to appeal to this court. What we have to determine is the meaning and application, as to the facts exhibited in this record, of certain provisions of the so-called "Warsaw Convention", a treaty to which thirty nations, including the United States, are parties and which treaty (printed in full in 49 U. S. Stat. pt. 2, p. 3000 et seq.) regulates and limits the liability of air carriers engaged in international transportation, as "international transportation" is defined in the Convention. The New York courts have dealt with the Convention, although not as to the precise point principally here involved, in Wyman v. Pan American (181 Misc. 963, affd. 267 App. Div. 947, affd. 293 N. Y. 878, certiorari denied 324 U. S. 882) and Garcia v. Pan American (183 Misc. 258, affd. 269 App. Div. 287, affd. 295 N. Y. 852, certiorari denied 329 U. S. 741, also 274 App. Div.

996). (The Garcia suit is by the executors of a passenger killed in this same February 22, 1943 disaster.) On the present appeal, unlike the Wyman and Garcia decisions, the real dispute is as to whether the facts brought out in the motion papers conclusively rebut, as the courts below held that they did rebut, the contention of plaintiff that no passenger ticket was "delivered" to her by defendant, such delivery being required by the Convention (art. 3) as a condition for limitation of the carrier's liability.

Appellant's first cause of action alleges the plane crash and her resulting injuries, sets out the law of Portugal as to liability of air carriers for injuries to passengers, and demands damages of $1,000,000. The answer, besides denials, affirmatively alleges that the flight was "international transportation" subject to the rules of the Warsaw Convention, and that accordingly, defendant is (in the absence of willful misconduct—see Convention, ch. 3, art. 25—which is not alleged in the first cause of action) liable for no more than 125,000 francs, or $8,291.87 at the rate of exchange specified in the Convention (see Convention, art. 22). Defendant, urging that $8,291.87 was this plaintiff's maximum possible recovery, moved on affidavits, for summary judgment dismissing the first count. Plaintiff countered with affidavits, to which we will refer later. The Special Term Justice first denied the motion, ruling that rules 113 and 114 of the Rules of Civil Practice were not available to defendant since defendant claimed only that excessive damages were being demanded in the complaint. Defendant, however, moved for reargument of its motion, conceding that it was liable for plaintiff's damages up to $8,291.87, and informing the court that neither party was urging any technical grounds as to the propriety of the summary judgment procedure but that both desired a determination, on the merits of the question as

to whether the limitations of the Convention operated against plaintiff's claim. Special Term thereupon held that the Convention required a holding that defendant's liability herein may not exceed $8,291.87. As to the main question argued—delivery of a ticket—Special Term found from the affidavits that the person (a Mr. Abraham, hereafter mentioned) who had physically taken delivery of the ticket issued by defendant in appellant's name had either express or implied authority to take delivery of that ticket on behalf of plaintiff. Special Term thereupon granted summary judgment of dismissal as to the first cause of action, giving appellant leave (which leave has not been availed of) to amend that cause of action by reducing the amount of her demand to $8,291.87. On the affirmance by the Appellate Division, no opinion was written, but one justice dissented and voted to reverse and deny the motion "on the ground that there are triable issues of fact" presumably as to the delivery of plaintiff's ticket. As to procedure below, we hold that it was proper under the circumstances, and because of the position taken by counsel at Special Term, to deal with this question by way of summary judgment—that is, it was permissible for Special Term to decide whether or not there was a triable issue of fact, and, accordingly, to grant or deny summary judgment.

Now as to whether appellant's ticket was "delivered" within the meaning of paragraphs 1 and 2 of the third article of the Convention, which paragraphs read as follows:

"1. For the transportation of passengers, the carrier must deliver a passenger ticket which shall contain the following particulars: (a) The place and date of issue; (b) the place of departure and destination; (c) the agreed

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stopping places; (d) the name and address of the carrier or carriers; (e) a statement that the transportation is subject to the rules relating to liability established by this convention.

"2. The absence, irregularity or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

Plaintiff-appellant is a theatrical performer. Her affidavit on this motion shows that sometime before February 19, 1943, she had made an arrangement with U. S. O. Camp Shows, Inc., the substance of which was that she volunteered "to entertain soldiers in the war areas" abroad. Her information was that U. S. O. Camp Shows, Inc., had some arrangement with the United States Government, whereby the former supplied entertainment and entertainers for our troops in those areas. Appellant, according to her affidavit, did not know, until after she had boarded the plane which later crashed, what her destination was or by what conveyance she was to travel. Her previous contacts in the matter were with Mr. Saul Abraham, an officer or employee of U. S. O. Camp Shows, Inc., who instructed her, on February 19, 1943, to get her baggage ready and, later, on the day the plane took off, went with her to LaGuardia Airport where she boarded defendant's Yankee Clipper. She avers in that opposing affidavit that she did not pay for her passage on the plane, never received any passage ticket at any time, knew noth-

ing of any limitations as to liability and never authorized Mr. Abraham or anyone else to accept a passage ticket for her, or to bind her to any limitation of the carrier's liability. However, in the same affidavit she states that "Mr. Abraham was in charge of all arrangements up to the point of embarkation", and she files, with her own affidavit, an affidavit by Mr. Abraham. Abraham's affidavit says this, in substance: he was employed by U. S. O. Camp Shows, Inc., and "was in charge of arranging transportation for theatrical performers who were planning to go overseas to entertain men serving in the Armed Forces"; he received (from some person not named) a list of those who were to go overseas, and had each of those persons fill out a "personal security questionnaire" which Abraham sent to a U. S. War Department official; he (Abraham) had the performers (including appellant) fingerprinted, and went with them to apply for and receive passports and visas; the arrangements for the purchase of tickets for performers' passage were made not by Abraham or U. S. O. Camp Shows, Inc., but by the United States Army which notified Abraham to pick up the tickets at defendant's office in Manhattan, which Abraham did, being instructed by someone (presumably an Army officer) not to disclose the date or time of departure but to assemble the performers and have them ready for immediate departure; when notice came to Abraham (presumably from the Army) that departure time was at hand, Abraham escorted all the performers, including appellant, to the Marine Terminal at LaGuardia Airport, he still having in his possession the tickets, not yet shown to any of the performers; at the Airport, Abraham "lined up all the performers" in front of desks and "placed in front of each her passport and ticket"; defendant's clerks tore off from each ticket the New York-to-Lisbon stub,

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and passed the rest of the tickets and the passports along the desks at which were seated custom inspectors, the performers likewise moving along in front of these desks as their tickets and passports were passed down the line; at the end of the line of desks the tickets and passports were handed back to Abraham, who held them until the plane's impending departure was signalled, when he put in the hands of each performer her passport and a slip of paper (not the ticket itself) admitting her to the plane; Abraham gave the tickets to another U. S. O. Camp Shows, Inc., employee or representative, who boarded the plane but was killed in the crash, the tickets being lost. However, attached to one of defendant's affidavits there is a copy of appellant's ticket, issued in her name and made out for travel from New York to the United Kingdom via Lisbon and back to New York, with intermediate stops, containing a notation, as required by the Warsaw Convention (see as quoted supra) that "transportation hereunder is subject to the rules relating to liability esablished by the Convention of Warsaw * * * ". This copy of a ticket is in exactly the same form as the one on which passenger Diaz travelled in Garcia v. Pan American (supra) and the holding there was (see, also, motion in that case decided herewith) as it must be here, that the flight of defendant's Yankee Clipper during which appellant was injured, was "international transportation" to which the Warsaw Convention was applicable, and that the ticket issued in appellant's name complied in form and content with article 3 of the Convention.

Appellant insists, however, that no ticket was ever delivered to her or anyone authorized by her, or, at least, that those were triable questions of fact. The Convention itself does not say, nor does appellant argue, that the language of article 3 makes physical delivery of the ticket

into the passenger's own hand a requisite for the limitation of liability. But, says appellant, there must be delivery to someone authorized by the passenger to take, for the passenger, delivery of a ticket expressing the limitation—and Abraham, says appellant, was never commissioned by her to receive a ticket for her and never licensed to accept, for her but without her knowledge, a ticket which by its terms, and because of its points of departure and return, put into operation against her although unknown to her, the drastic restrictions of the Warsaw Convention. There is, of course, no affirmative showing here of any specific instruction from appellant to Abraham accrediting him to act for her in respect to this particular kind of ticket or any ticket. Perhaps such authorization could be spelled out of the statements in her (and Abraham's) affidavit that he "was in charge of all arrangements up to the point of embarkation" or out of the undisputed fact that appellant knew that Abraham had procured a passport for her, ordered her luggage sent to an airline office, and had escorted her to a marine airport, which certainly was notice to her that, pursuant to negotiations by him, she was about to take passage in an overseas plane for some destination outside of the United States. Whether or not all this added up, as matter of law, to a sufficient showing of authority in Abraham, it can hardly be disputed that, when a ticket bearing appellant's name and all particulars as to the intended route as well as a reference to the Warsaw Convention limitation, was laid in front of appellant on the table in the airport, she, by thereafter boarding the plane as a traveller on that ticket, impliedly, if not expressly, ratified and adopted what had been done by the Army, and later by Abraham, in taking out that ticket in her name.

Thus the special, and undisputed, facts in these affidavits make impossible, as a matter of law, any finding other than that the ticket was "delivered", and so it was right to hold that the top limit of recovery was $8,291.87.

And the same result is reached by examining into the general purport and purpose of the Convention and its article 3. We have held elsewhere that this identical New York-to-Lisbon-and-return journey was "international transportation" the law of which was the Warsaw Convention (Garcia v. Pan American, supra), and that the international code of law expressed in the Convention overrides and supplants any contrary local law as to the legality of limiting a carrier's liability (Wyman v. Pan American, supra). Plaintiff, of course, was presumed to know the law and was bound thereby. Furthermore, while the Convention speaks of transportation under a "contract" and requires delivery of a ticket warning of the limitation, it is plain that the limitation is one created by the Convention itself, and is not the product of consensual arrangements between the parties. Paragraph (2) of Article 1, in its reference to "the contract made by the parties" means, obviously and on its face, not that the Convention applies only when the parties contract for its application, but that it applies (unless by special arrangement otherwise) whenever, "according to the contract made by the parties", the place of departure and the place of ultimate destination are within the territories of two of the "High Contracting Parties" or both within the territory of a "single High Contracting Party" with certain agreed stopping places elsewhere. Put another way, that means that the Convention becomes the law of the carriage when the "contract" of the parties provides for passage between certain described termini. When such is the contract, then the Convention has automatic full

impact, by its own terms and not because the parties have so agreed. The requirement of article 3 of the Convention, quoted in the third paragraph of this opinion, that there must be delivery of a ticket is thus a condition set up by the Convention itself, as a determinant of the applicability, or no, of the Convention's limited liability rules; but that is by no means the same thing as saying that the limitation is a contractual one, depending for its existence and validity on express assent thereto by the passenger. Since the Convention itself, as a statute, grants and mandates the limitation unless "the carrier accepts a passenger without a passenger ticket having been delivered", there is no need for a carrier who claims the limitation to show more than the delivery of an appropriate ticket, and travel of the passenger thereunder. Parenthetically, we note that under New York cases and cases elsewhere, even where the limitation is purely contractual, acceptance of a trans-oceanic ticket stating the limitation '"gives rise to an implication of assent"' whether the ticket be read by the passenger or not (Reichman v. Compagne Generale Transatlantique, 290 N. Y. 344, and cases cited at p. 351). We close this part of the opinion by this comment: this treaty, like any other statute, must be construed reasonably and so as to accomplish its obvious purposes (see Matter of Zalewski, 292 N. Y. 332, 336). In his letter to the President sending the Convention to him preparatory to transmission to the Senate, former Secretary of State Hull pointed out that article 17, of chapter III benefited passengers by creating a presumption of liability on the mere happening of an accident and further described the beneficial purposes of the treaty as follows:

"It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges." (Senate Document, Executive G, 73d Cong. 2nd sess., p. 3.)

Those aims would be poorly served by any holding that the limitation of liability is available only when a carrier can produce affirmative proof not only that the passenger ticket complied with the Convention, but that the individual who bought that ticket at the carrier's ticket counter, was the passenger himself or someone specifically authorized by the passenger to consent, on the latter's behalf, to limited liability.

Coming back to the undisputed facts of the case we have before us, let us remember that, as to defendant, this was a routine sale, in ordinary course of its common carrier business, of a ticket which nominated appellant as the intending passenger. If there was here any failure adequately to inform appellant of her subjection to the Warsaw Convention, that failure was not defendant's—and yet, if we were to hold that there was, somehow, lack of appropriate "delivery" here, defendant would be the loser. Putting it another way: it was no concern of the carrier as to what the arrangements were between the passenger and the person who took delivery of the ticket.

Turning to another question: one of the other points in appellant's brief argues that "the transportation of the

plaintiff was performed by the United States Government and, therefore, the Warsaw Convention does not apply". The adherence by the United States to the Convention was expressly made subject to a reservation which any high contracting party had the right to declare at the time of ratification. That reservation, as expressed in the additional protocol (see 49 U. S. Stat. at Large, pt. 2, p. 3025) was: "that the first paragraph of Article 2 of this Convention shall not apply to international transportation by air performed directly by the State * * * ". In proclaiming the treaty, the President described (see 49 U. S. Stat., pt. 2, p. 3013) the reservation a little differently, as follows: "that the first paragraph of Article 2 of the Convention shall not apply to international transportation that may be performed by the United States * * * ". (The President omitted the word "directly".) Taking either wording of the reservation, it is plain that the appellant's transportation was not "performed by the United States". The United States Army, apparently, bought appellant's ticket but her transportation was, as she herself alleged in paragraph Fourth of her complaint here, on an aircraft "owned, operated and controlled by the defendant".

We should point out that there is no question here of the effect, on appellant's ultimate rights, of so much of article 25 of the Convention as says that the carrier shall not be entitled to limitation of his liability to the passenger "if the damage is caused by his wilful misconduct * * * ". Willful misconduct is not alleged in the first cause of action (which has been dismissed) of this complaint, although it is charged in the third count, which stands undismissed.

The order should be affirmed, with costs, the first certified question answered in the affirmative, the second and fourth certified questions answered in the negative, and the third certified question not answered.

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Dissenting Opinion of Court of Appeals

Conway, J. (dissenting). This is an appeal by Ellen Jane Ross (hereinafter referred to as plaintiff or appellant), known as Jane Froman, from a non unanimous order of the Appellate Division, First Department affirming without opinion an order of Special Term (Botein, J.) which granted defendant's motion for summary judgment dismissing the complaint as to the first cause of action "with leave to the plaintiffs to amend the complaint by reducing the amount of the damages demanded in the first cause of action" to $8,291.87. The Appellate Division granted leave to appeal and certified the following four questions:

"1. Upon the record here, should the defendant's motion for summary judgment be granted and the first cause of action dismissed?

"2. Upon the record here, has the plaintiff shown sufficient evidence to create a triable issue of fact?

"3. Was Mr. Abraham of the U.S.O. Camp Shows, Inc. an agent of the plaintiff-appellant, authorized to receive a ticket on her behalf, for international transportation under the Warsaw Convention?

"4. Was the plaintiff-appellant's transportation, alleged in this action, performed by the United States government, within the meaning of the Warsaw Convention, so as to exclude such transportation from the application of the limitation provision of the Warsaw Convention?"

The complaint alleged four causes of action. Briefly, the first cause of action alleged that appellant while riding as a passenger in one of defendant's seaplanes known

as the "Yankee Clipper" suffered severe bodily injuries when the plane crashed near Lisbon, Portugal, on February 22, 1943, and that the accident was caused by the negligence of defendant. Defendant's motion for summary judgment was addressed solely to the first cause of action in which appellant alleged damages to the extent of one million dollars.

The third cause of action alleged that the accident was due to the "wilful misconduct" of defendant. The second and fourth causes of action sought recovery for loss of baggage in the sum of $10,000 and for medical expenses and for loss of society to the extent of $100,000.

In its answer the defendant pleaded five affirmative defenses, the first two of which are based on the international treaty commonly known as the "Warsaw Convention" which was concluded at Warsaw, Poland, on October 12, 1929, and to which the United States became a party with reservation by Proclamation of the President, dated October 29, 1934, as advised by the Senate of the United States. (49 U. S. Stat., part 2, p. 3000 et seq.)

In its first defense defendant alleged that at the time appellant was injured "she was being transported under a contract of transportation wherein the place of departure and the place of destination were within the United States and there were agreed stopping places at Lisbon, Portugal, the United Kingdom of Great Britain and Northern Ireland, and Natal, Brazil; that said transportation was international transportation within and subject to the * * * Warsaw Convention * * * ", and therefore defendant's liability, if any, was limited by the terms thereof to 125,000 francs or its equivalent, $8,291.87.

In the second defense defendant alleged that appellant and defendant entered into a contract of transportation "evidenced by a ticket in writing" which contained cer-

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tain terms and conditions of the Warsaw Convention. As in the first defense, defendant alleged that the rights of the parties were governed by the rules relating to liability established by the Warsaw Convention; that the defendant duly complied with all the conditions and requirements thereof; that the defendant took all the necessary measures to avoid the damages claimed by plaintiff and that defendant claimed exemption from, and limitation of, liability in accordance with the rules of the Warsaw Convention.

The remaining defenses were not referred to on defendant's motion for summary judgment and are not material here.

Defendant moved for an order under rules 113 and 114 of the Rules of Civil Practice granting summary judgment dismissing plaintiffs' first cause of action. The defendant submitted two affidavits in support of the motion. One, by its attorney, contained a discussion of the provisions of the Warsaw Convention and the law. The other was made by Robert Waters, a "Traffic Representative in the New York District Sales Office" of the defendant. He alleged that on February 15, 1943, he was instructed to prepare reservation sheets for a number of passengers who were scheduled to depart from New York on a round trip flight to the United Kingdom for the purpose of entertaining soldiers in the European area, under the management of U.S.O. Camp Shows, Inc., and that appellant was among the passengers. He prepared the reservation sheets and sent them to the ticket department for preparation of the tickets. The tickets were delivered to Mr. Saul Abraham of U.S.O. Camp Shows, Inc. The auditor's stub was detached from the ticket issued in the name of appellant and retained by defendant. The remainder of the ticket was delivered to Mr. Abra-

ham and was presumably lost at the time of the accident. Attached to the affidavit is a facsimile of the portion of the ticket delivered to Mr. Abraham. Also annexed to the affidavit is a photostatic copy of the flight coupon portion of the ticket covering the leg of the flight from New York to Bermuda which it is alleged would have been surrendered by the passenger upon embarkation at New York. The affidavit explains the abbreviations on the facsimile ticket and recites the amount of the fare. That was the extent of defendant's proof. There was no allegation that defendant received any instructions to prepare the tickets from appellant or that the ticket was delivered to her personally.

Appellant submitted three affidavits in opposition to the motion. One was executed by her attorney and contained a discussion of the terms of the Warsaw Convention and of the law. The second was her own affidavit and alleged that during the last war and on or about February 15, 1943, she was engaged in endeavoring to entertain soldiers in the war areas, "by arrangement with the U.S.O. Camp Shows, Inc." which she believes had an arrangement with the United States Government to supply such entertainment for the armed forces in the various war areas. It is to be noted that she did not allege that she was employed by either the War Department or U.S.O. Camp Shows, Inc. and that the defendant does not allege it either. She further stated: "I received no advance information from either the Government or U.S.O. Camp Shows, Inc. as to when and where I was to go and by what mode of transportation." On February 19, 1943, she was instructed by Mr. Abraham of U.S.O. Camp Shows, Inc., to prepare her baggage and shortly thereafter he picked her up and brought her to LaGuardia Airport. It was not until after she had boarded the airplane

that she had any information as to her destination. She said that "Mr. Abraham was in charge of all arrangements up to the point of embarkation". *She received no passage ticket and was not informed by anyone that a ticket had been purchased in her name. She did not authorize Mr. Abraham or anyone else to accept a passage ticket for her.* She did not pay for the passage and she believed "that the Government of the United States, through the Special Service Division of the War Department" arranged for her passage. She suffered permanent injuries which prevented her from walking and from engaging in her profession with a consequent loss of earnings and medical expenses up to that time in excess of $200,000, and that she was informed and believed that she had a good and meritorious cause of action far in excess of the amount of limited liability provided in the Warsaw Convention.

Appellant also submitted an affidavit by Mr. Abraham, an employee of U.S.O. Camp Shows, Inc., who stated that he was in charge of arranging transportation for theatrical performers who were to be sent overseas. When he learned the names and addresses of the performers who were to go overseas on this flight of the "Yankee Clipper" he had them fill out and sign a "personnel security questionnaire',' a copy of which he sent to the Special Service Division of the War Department in Washington. Thereafter, the performers were fingerprinted and applications for passports and visas filled out. His affidavit then stated, "U.S.O. Camp Shows, Inc. *never made any arrangements for the actual transportation of the performers. The arrangements were made by the War Department* and, in this instance, I was notified a few days prior to the date of departure that the War Department had made arrangements for the performers to leave New

York on a Pan-American Airways clipper and was told to pick up the tickets at the Airlines Building at 80 E. 42nd Street, New York City. I, personally, attended to the matter of picking up the tickets." For the purposes of this motion those statements must be taken as true. Moreover, those statements are confirmed by the admission in defendant's own bill of particulars which alleged: "On information and belief the persons who acted on plaintiff's behalf were a Mr. Abrams (Abraham) of U.S.O. Camp Shows, Inc., and a Captain Malone of the War Department." The date and time of departure was a military secret, and he was finally instructed to assemble the performers and have them available for immediate departure. He personally brought the group to LaGuardia Airport, at which time, he still had the tickets in his possession which he had picked up at the Air Lines Building and which he had not shown to any of the performers. At the airport he showed the tickets and passports to the customs inspector who ushered the group into a large rotunda where there were several of defendant's clerks behind a number of desks. He said, "I lined up all the performers in front of these desks and placed in front of each his or her passport and ticket. The clerks tore the 'New York-Lisbon' stub from each ticket and passed tickets and passports along to the desks at which were seated various customs inspectors as the performers likewise moved passed (sic.) these desks. I was standing at the end of the line of desks and after the inspectors checked the tickets and passports, *they handed them to me.*" (Emphasis supplied.) Defendant does not allege and Special Term did not find that that was personal delivery to appellant. Reliance is solely on implied agency in Abraham to receive for appellant a ticket for *international transportation.*

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When the party entered the gate to board the plane he gave each of the performers his or her passport and "a slip of paper which had been inserted therein at the time they were inspected by the Customs Officials, which slip of paper entitled the performer to board the plane." He instructed the performers to give their passports to Mr. Rognan, who had been selected as manager of the company, and he personally handed Mr. Rognan all of the tickets. That was the last he saw of them."

Special Term dismissed defendant's original motion with the following memorandum: "This is a motion pursuant to Rules 113 and 114, Rules of Civil Practice for summary judgment dismissing the first cause of action. *It is clear from the moving papers that even if the defendant's contentions are correct plaintiff may be entitled to recover up to $8,291.87.* The cause of action may not be dismissed pursuant to Rule 113, Rules of Civil Practice merely because it seeks an excessive amount of damages. Nor may defendant obtain relief under Rule 114, Rules of Civil Practice * * *. The claim asserted in the cause of action sought to be dismissed is a single and entire one and does not consist of one or more of several causes. It is to be noted that *defendant does not concede that plaintiff is entitled to judgment in the sum of $8,291.87 and does not move for judgment in favor of the plaintiff in that sum*, as did the defendant in Garcia v. Pan American Airways, Inc., (N. Y. L. J., April 26, 1947, p. 1644, col. 3). Motion denied (Emphasis supplied) (190 Misc. 974-975).

Defendant then made a motion for reargument and submitted an affidavit of its attorney in which it conceded liability to the extent of $8,291.87 for the purpose of the motion. The affidavit stated, "In view of this concession, it is submitted that the said plaintiff, with respect to the first cause of action alleged in the complaint, has

failed to show any facts which might be deemed 'to present any triable issue of fact other than the question of the amount of damages for which judgment should be granted' * * * ". Thus the parties presented to Special Term the question whether it might be said that the Warsaw Convention was applicable here as a matter of law so that only $8,291.87 was recoverable or whether there were triable issues of fact as to its applicability.

Special Term granted the motion for reargument and thereupon granted defendant's original motion to dismiss the first cause of action "with leave to the plaintiffs to amend the complaint by reducing the amount of the damages demanded in the first cause of action" to $8,291.87. It handed down an opinion in which it was said:

"On this motion by defendant for reargument plaintiffs state in their brief that they do not 'urge the technical ground in opposition to the motion for summary judgment that summary judgment does not lie or that Rule 113 of the Rules of Civil Practice does not apply to the instant case.' Since plaintiffs as well as defendant desire a determination of the merits, the court will decide the original motion without regard to procedural obstacles.

"*The question presented* is whether the Warsaw Convention requires a holding that the defendant's liability cannot exceed the sum of $8,291.87. Defendant relies upon the case of Garcia v. Pan American Airways, Inc. (183 Misc. 258, affd. 269 App. Div. 287, affd. 295 N. Y. 852, cert. den. 329 U. S. 741). Plaintiffs attempt to distinguish the cited case on two grounds: (1) that the defendant did not deliver a passenger ticket as required by article 3 of the Warsaw Convention, and (2) that the plaintiffs have alleged that the defendant was guilty of willful misconduct and therefore, by virtue of the provi-

sions of article 25 of the Convention, defendant is not entitled to avail itself of the provisions of the Convention which exclude or limit liability.

"The second ground may be disposed of briefly. The motion seeks dismissal only of the first cause of action. That cause is predicated solely upon the alleged negligence of the defendant and contains no averment charging willful misconduct on the part of defendant. It is the third cause of action, not affected by the present motion, which alleges that the accident occurred as the result of willful misconduct by the defendant.

"The claim that the defendant did not make delivery of a ticket within the meaning of article 3 of the Warsaw Convention also appears to be without merit. The convention does not require that physical delivery be made to the passenger in person. The moving affidavit of defendant's traffic representative states that the ticket issued in the name of the female plaintiff was delivered to a Mr. Abraham of U.S.O. Camp Shows, Inc. The plaintiff was one of a group of entertainers scheduled to make the flight for the purpose of entertaining soldiers in the European area under the management of U.S.O. Camp Shows, Inc. The affidavit of the female plaintiff admits that 'Mr. Abraham was in charge of all arrangements up to the point of embarkation.' Abraham's affidavit also concedes that he was in charge of arranging transportation for the group, which included the female plaintiff. It seems clear that even if Abraham had no express authority to receive a ticket on behalf of the female plaintiff *he had implied authority to do so and that the delivery of the ticket to him is binding upon said plaintiff.* * * *" (Emphasis supplied.) (190 Misc. 975-976).

Thus the two primary questions presented to Special Term and the Appellate Division and certified to us as questions 2 and 3 were whether the plaintiff had shown sufficient evidence to create a triable issue of fact and whether Mr. Abraham was an agent of appellant authorized to receive a ticket on her behalf for "international transportation" under the Warsaw Convention as a matter of law.

Article 3 of the Warsaw Convention referred to by Special Term provides in part as follows:

"(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

"(a) The place and date of issue;

"(b) The place of departure and of destination;

"(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

"(d) The name and address of the carrier or carriers;

"(e) *A statement that the transportation is subject to the rules relating to liability established by this convention.*

"(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be

subject to the rules of this convention. *Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.*" (Emphasis supplied.)

In our judgment Special Term erred in granting plaintiff's motion for summary judgment dismissing the first cause of action because appellant has clearly shown sufficient evidence to create a triable issue of fact. Accordingly question number one should be answered in the negative and question number two in the affirmative. We cannot say as a *matter of law* on this record that plaintiff authorized the War Department or U.S.O. Camp Shows, Inc., to contract on her behalf for "international transportation" within the meaning of the Convention, nor that Mr. Abraham of the U.S.O. Camp Shows, Inc., was authorized to accept delivery on her behalf of a ticket for such international transportation. Thus question number three must be answered in the negative.

It is important to note that the War Department could have purchased transportation for appellant on defendant's airplane under at least three different arrangements in which the Warsaw Convention in its entirety, or its provisions limiting the defendant's liability, would not have been operative.

First, the Warsaw Convention provides in article 1, paragraphs (1) and (2) in part as follows:

"(1) This convention shall apply to all *international transportation* of persons, baggage, or goods performed by aircraft for hire. * * *

"(2) For the purposes of this convention the expression 'international transportation' shall mean any trans-

portation in which, *according to the contract made by the parties,* the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an *agreed stopping place* within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an *agreed stopping place* between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purpose of this convention." (Emphasis supplied.)

Thus the Convention provides that it applies to "international transportation" when "according to the contract made by the parties" the transportation is to be performed between certain places of departure and certain places of destination. If the passenger does not *contract* to travel between such places so defined the Convention does not apply. It would not apply for example to the passage of a person making a one way trip to Portugal, a country not a party to the Convention. That was one of the issues in the Garcia case (supra), and we so held. (See 269 App. Div. 287, 290-1, affd. 295 N. Y. 852, certiorari denied, 329 U. S. 741.

Secondly, (paragraph 1 of article 2) of the Convention provides: "This Convention shall apply to transportation performed by the State or by legal entities constituted under public law provided it falls within the conditions laid down in article 1."

However, in the Proclamation of the President, dated October 29, 1934, the adherence of the United States was stated to be subject to the following reservation: (49 U. S. Stat., pt. 2, p. 3013) " * * * that the first paragraph of Article 2 of the convention shall not apply to international transportation that may be performed by the United States of America * * *." The Convention is not applicable, therefore, to transportation "performed" by the United States Government.

Thirdly, article 22, paragraph (1) which limits the liability of the carrier for each passenger to the sum of 125,000 francs provides: "Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability."

In accordance with that provision it was possible for the War Department to have entered into a "special contract" on behalf of plaintiff subjecting defendant to a higher limit of liability than 125,000 francs or its equivalent.

In order for defendant to prevail on this motion it was required to show *as a matter of law* that appellant authorized someone to enter into a contract in her name for "international transportation" within the meaning of the Warsaw Convention and that she authorized someone to accept delivery of a ticket for her for such transportation. While her papers indicate that she "was engaged in endeavoring to entertain soldiers in the war areas, by arrangement with the U.S.O. Camp Shows, Inc."; that she believed "the Government of the United States through the Special Service Division of the War Department arranged" for her transportation; that Mr. Abraham was entrusted by the U.S.O. Camp Shows, Inc., with

the duty of picking up her baggage, processing her passport application and accompanying her to the airport, it cannot be said *as a matter of law* that she authorized or consented to "international transportation" within the meaning of the Warsaw Convention with limited liability. Neither do the events at the airport compel that conclusion. Although the ticket with her passport was placed in front of her on a desk at the airport, the defendant has not alleged delivery to her personally and Special Term found no such personal delivery. It could not, for there was no attempt at proof that she even saw the ticket. The finding was that Mr. Abraham had implied authority on behalf of plaintiff to accept for her a ticket for "international transportation" as a matter of law. That was clearly a question of fact.

Nor can there be any question of ratification on this record either as a matter of fact or of law. Her entry into the plane did not constitute ratification by her *as a matter of law* of what had been done by the War Department or Mr. Abraham. The fact that she boarded the plane did not necessarily indicate "international transportation" under the Warsaw Convention as we have seen. Planes go from La Guardia Airport to all parts of the United States as well as to Europe. She says she "had no advance information from either the Government or U.S.O. Camp Shows, Inc. as to when and where I was to go and by what mode of transportation". On this motion that must be accepted as true. Ratification occurs only when the person claimed to have ratified a contract made by or an act done by another has full knowledge of all the material facts as to the contract entered into or of the act performed. (Smith v. Kidd, 68 N. Y. 130, 142.) Moreover, ratification was not pleaded, was not alleged

in the affidavits, was not urged in the briefs and was not found by Special Term.

Appellant could have reasonably assumed that her passage was being arranged under any of the three situations which we have mentioned above. "International transportation" under the Warsaw Convention with limited liability was not the only possible arrangement under which she could have been a passenger on defendant's airplane. She may be able to prove that she was acting under a reasonable assumption that she was only going to a place to which the Convention did not apply. She may well have assumed that she was about to fly to a place within the United States, e. g. to San Francisco to board another plane or a boat for the Pacific theatre of war. She may have assumed that it was transportation which was not covered by the Warsaw Convention because she had not agreed upon the "agreed stopping place" provided for in paragraph (2) of article 1 of the Convention, quoted (supra, pp. 107-108) and since she had not so agreed, the Convention expressly excluded her transportation from the Convention.

Since the War Department was arranging her transportation to *war areas*, she may have reasonably assumed and may be able to prove that the Government was "performing" the transportation in such a manner that the Convention was inoperative. Defendant's proof is certainly not conclusive that appellant knew or should have known that the War Department had purchased a passenger ticket for her for "international transportation" on a privately operated commercial airline. The arrangement between the Government and the defendant may well have been such that the Government was "performing" the transportation within the meaning of the reservation to the Convention. That is for the trial. In

fact appellant argues with some force that the instant transportation was "performed" by the United States Government. We need not now decide that question, which is the fourth question certified by the Appellate Division, in view of our conclusion that the order below should be reversed because a triable issue of fact exists with reference to question number 3.

Another reasonable assumption on appellant's part may have been that the War Department would enter into a "special contract" with defendant for liability in excess of the Convention limits for appellant's protection.

Thus we cannot say that the *only inference* which may be drawn from this record is that the War Department had implied authority to limit appellant's recovery by contracting for "international transportation" within the meaning of the Convention, or that Mr. Abraham had implied authority to accept such a ticket. Appellant is entitled to every favorable inference which may reasonably be drawn from the papers and in our judgment it is a fair inference which may be drawn that she did not consent to participate in "international transportation" under the Warsaw Convention with its limitations on the carrier's liability. That is clearly a question of fact.

Appellant should have an opportunity to prove that she expected the United States Government to "perform" the transportation, or that either a "special contract" or adequate insurance by defendant was to be arranged for her benefit. That is particularly so since she was not permitted to know her destination or method of transportation and thus could not herself obtain the insurance available to every passenger at railroad stations and airports and sold by the same clerks who sell transportation tickets, or at least that if "international transportation" with limited liability under the Warsaw Convention were

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arranged that she would be informed so that she might protect herself by purchasing insurance.

The Convention requires (1) that the ticket contain certain express particulars including "a statement that the transportation is subject to the rules relating to liability established by this conventon" (art. 3, par. 1, cl. [e]), and (2) that unless the carrier deliver a ticket, it may not avail itself of the provisions of the Convention limiting its liability. The purpose of those requirements, of course, is to bring to the attention of the passenger that the carrier's liability is limited. When the Convention was concluded in 1929, only two years after Lindbergh's historic flight, international air travel was in its infancy. We were living in a different world and airlines were no doubt thought to need assistance in developing international air travel. There can be little doubt, however, that the framers of the Convention included the requirements mentioned in view of what my brother Desmond has termed the "drastic restrictions" of the Convention. They were drastic even in 1929. Injury or death from negligence of the carrier was fixed at 125,000 "French francs consisting of 65½ milligrams of gold of the standard of fineness of nine hundred thousandths" (art. 22, par. [4]), or $8,291.87. Since then our dollar has been devaluated 40% so that the total amount recoverable for injury or death due to negligence is less in 1929 dollar value than five thousand dollars. In our opinion the aims and intendments of the Warsaw Convention and the protection of our own residents are best served by refusing summary judgment drastically limiting liability except upon proof that "international transportation" was contracted for by the passenger or her duly authorized agent and that a ticket was delivered, with the particulars required by the Warsaw Convention printed thereon to the

passenger or his or her duly authorized agent. The airlines have been given the utmost consideration as against the passengers they are paid to transport. At least they should be held sharply to the doing of the few acts which are required by the Warsaw Convention in return for the consideration granted them.

The rule recited in Reichman v. Compagnie Generale Transatlantique (290 N. Y. 344, and cases cited at p. 351) that "the act of acceptance" of the ticket "gives rise to an implication of assent" to the terms contained therein has no application here. That rule presupposes delivery or acceptance of the ticket. Here the issue is not the failure of appellant to read the ticket, but the failure of defendant to deliver it to her or her agent.

The order should be reversed and questions number 1 and 3 answered in the negative, question number 2 answered in the affirmative and question number 4 not answered.

Loughran, Ch. J., Dye, Fuld and Bromley, JJ., concur with Desmond, J.; Conway, J., dissents in opinion in which Lewis, J., concurs.

Order affirmed, etc.

Memorandum Decision of Appellate Division

Reported 274 App. Div. 767, 80 N. Y. Supp. (2nd) 735

Order affirmed, with $20 costs and disbursements to the respondent. No opinion. Present—Glennon, J. P., Dore, Cohn, Callahan and Shientag, JJ., Callahan, J., dissents and votes to reverse and deny the motion on the ground that there are triable issues of fact.

Opinion at Special Term

Reported 190 Misc. 974, 77 N. Y. Supp. (2nd) 257

By Mr. Justice Botein

Ross v. *Pan-American Airways, Inc.*—On this motion by defendant for reargument plaintiffs state in their brief that they do not "urge the technical ground in opposition to the motion for summary judgment that summary judgment does not lie or that Rule 113 of the Rules of Civil Practice does not apply to the instant case." Since plaintiffs as well as defendant desire a determination of the merits, the court will decide the original motion without regard to procedural obstacles.

The question presented is whether the Warsaw Convention requires a holding that the defendant's liability cannot exceed the sum of $8,291.87. Defendant relies upon the case of *Garcia* v. *Pan American Airways, Inc.*, 183 Misc., 258, aff'd 269 App. Div., 287, aff'd 295 N. Y., 852, cert. den. 329 U. S., 741). Plaintiffs attempt to distinguish the cited case on two grounds: (1) that the defendant did not deliver a passenger ticket as required by article 3 of the Warsaw Convention, and (2) that the plaintiffs have alleged that the defendant was guilty of willful misconduct and therefore, by virtue of the provisions of article 25 of the Convention, defendant is not entitled to avail itself of the provisions of the Convention which exclude or limit liability.

The second ground may be disposed of briefly. The motion seeks dismissal only of the first cause of action. That cause is predicated solely upon the alleged negligence of the defendant and contains no averment charging willful misconduct on the part of defendant. It is the third

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cause of action, not affected by the present motion, which alleges that the accident occurred as the result of willful misconduct by the defendant.

The claim that the defendant did not make delivery of a ticket within the meaning of article 3 of the Warsaw Convention also appears to be without merit. The Convention does not require that physical delivery be made to the passenger in person. The moving affidavit of defendant's traffic representative states that the ticket issued in the name of the female plaintiff was delivered to a Mr. Abraham of U. S. O. Camp Shows, Inc. The plaintiff was one of a group of entertainers scheduled to make the flight for the purpose of entertaining soldiers in the European area under the management of U. S. O. Camp Shows, Inc. The affidavit of the female plaintiff admits that "Mr. Abraham was in charge of all arrangements up to the point of embarkation." Abraham's affidavit also concedes that he was in charge of arranging transportation for the group, which included the female plaintiff. It seems clear that even if Abraham had no express authority to receive a ticket on behalf of the female plaintiff he had implied authority to do so and that the delivery of the ticket to him is binding upon said plaintiff. The cases relied upon by the latter are not in point. The case of *"The Majestic"* (166 U. S., 385), involved the question whether notice on the ticket regarding limitation of liability, which was however not made part of the contractual part of the ticket, was binding on the passengers.

The motion for reargument is granted and upon such reargument the original motion to dismiss the first cause of action is granted, with leave to amend the same by reducing the amount of the damages demanded to $8,291.87. Settle order.

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IN THE

Supreme Court of the United States

October Term, 1954

No. 735

JANE FROMAN,

Petitioner,

v.

PAN AMERICAN AIRWAYS, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 735

JANE FROMAN,

Petitioner,

v.

PAN AMERICAN AIRWAYS, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

(A)

The judgment sought to be reviewed involves an erroneous interpretation of Article 3 (1) of the Warsaw Convention, dealing with delivery of a ticket and is not a determination of a question of fact as to the existence of agency or ratification.

(B)

The holding by the Court of Appeals, that the Government of the United States was not performing petitioner's transportation, within the meaning of the United States reservation to Article 2 (1), and the additional protocol thereto, is erroneous and requires independent determination by this Court.

(C)

There is presented, here, an adjudication by a State Court interpreting the terms of a Federal Treaty, involving a Federal question of substance not theretofore determined by this Court.

(A)

Respondent contends, that the prevailing opinion of the Court of Appeals, rests upon a finding of fact, that petitioner ratified the acts of the Army or of the U.S.O. in procuring a ticket in her name, and therefore, the determination does not involve a construction of the provisions of the Warsaw Convention.

If that were so, it could find no support in the record at bar, for respondent's sole allegation of fact, is that its traffic agent, "was instructed to prepare reservation sheets for a number of passengers who were scheduled to depart from New York on a round trip flight to the United Kingdom and return to New York for the purpose of entertaining soldiers in the European area under management of U.S.O. Camp Shows, Inc." (fol. 66).

The record at bar contains no other factual allegations from the respondent in any wise, connecting petitioner with said instructions or with any subsequent acts of ratification. There is, however, specific allegations by the petitioner that she did not contract for any passage, had no knowledge of her destination until after she had boarded the plane and did not receive delivery of a passage ticket nor had she any knowledge of the ticket provisions for international transportation and the resulting limitation of liability (fols. 117-120, 125-130), all of which was not put in issue, as a fact, by respondent.

More so, the prevailing opinion indicates quite clearly that its holding was based upon a strict legal construction of the delivery provisions of Article 3, of the Warsaw Convention, for it states (Petition, pp. 16 to 18):

> * * * "There is, of course, no affirmative showing here of any specific instruction from appellant

to Abraham accrediting him to act for her in respect to this particular kind of ticket or any ticket." * * *

* * * "Plaintiff, of course, was presumed to know the law, and was bound thereby. Furthermore, while the Convention speaks of transportation under a 'contract' and requires delivery of a ticket warning of the limitation, it is plain that the limitation is one created by the Convention itself, and is not the product of consensual arrangements between the parties. Paragraph (2) of Article 1, in its reference to 'the contract made by the parties' means, obviously and on its face, not that the Convention applies only when the parties contract for its application, but that it applies (unless by special arrangement otherwise) whenever, 'according to the contract made by the parties', the place of departure and the place of ultimate destination are within the territories of two of the 'High Contracting Parties' or both within the territory of a 'single High Contracting Party' with certain agreed stopping places elsewhere." * * *

* * * "The requirement of Article 3 of the Convention, quoted in the third paragraph of this opinion, that there must be delivery of a ticket is thus a condition set up by the Convention itself, as a detriment of the applicability, or no, of the Convention's limited liability rules: but that is by no means the same thing as saying that the limitation is a contractual one, depending for its existence and validity on express assent thereto by the passenger. Since the Convention itself, as a statute, grants and mandates the limitation unless 'the carrier accepts a passenger without a passenger ticket having been delivered', *there is no need for a car-*

rier who claims the limitation to show more than the delivery of an appropriate ticket, and travel of the passenger thereunder." * * * (Italics ours.)

In other words, the Court of Appeals holding is, that delivery to the passenger or his agent is not required. That is, delivery could be made to anyone or not at all, providing the carrier issues the ticket for "international transportation" and the passenger enters upon the plane and is transported.

We submit that to be the core of the Court of Appeals determination and that it constitutes a drastic extension of the provisions of the Convention.

We submit further, that if the Court of Appeals determination can be said to be a finding of law, that acceptance of transportation upon this plane, as disclosed by the record, constituted a ratification by petitioner to the creation of a contract for "international transportation" with limitation of liability, then the determination is completely erroneous.

As was indicated by Judge Conway in his dissenting opinion, ratification connotes full knowledge of all material facts as to the contract alleged to have been entered into on the principal's behalf. (See, *Smith* v. *Kidd*, 68 N. Y. 130, 142; Mechem's on Agency, Sections 725, 726; The Majestic, 166 U. S. 375; *Saunders* v. *Southern Railway Co.*, 128 Fed. 15.) The record at bar does not disclose one scintilla of evidence that petitioner had any knowledge of her intended destination or that she was about to be transported under a contract for "international transportation".

We submit, that the dissenting opinion by Judge Conway on this issue, is correct (Petition, pp. 33, 36-7):

> * * * "In order for defendant to prevail on this motion, it was required to show as a matter of law that appellant authorized someone to enter into a contract in her name for 'international transportation' within the meaning of the Warsaw Convention and that she authorized someone to accept delivery of a ticket for her for such transportation." * * *
>
> * * * "In our opinion the aims and intendments of the Warsaw Convention and the protection of our own residents are best served by refusing summary judgment drastically limiting liability except upon proof that 'international transportation' was contracted for by the passenger or her duly authorized agent and that a ticket was delivered, with the particulars required by the Warsaw Convention printed thereon to the passenger or his or her duly authorized agent. The airlines have been given the utmost consideration as against the passengers they are paid to transport. At least they should be held sharply to the doing of the few acts which are required by the Warsaw Convention in return for the consideration granted them." * * *

It is clear therefor, that the Court of Appeals determination is "not only without fair support in the evidence but that the evidence conclusively refutes it", and is contrary to law, so that the decree deprives the petitioner of a federal right on a non-federal ground of decision (*Ancient Egyptian Arabic Order* v. *Michaux*, 279 U. S. 737).

(B)

The prevailing opinion, upon the issue of whether the United States Government performed petitioner's transportation, states (Petition, p. 20):

> * * * "Taking either wording of the reservation, it is plain that the appellant's transportation was not 'performed by the United States'. The United States Army, apparently, bought appellant's ticket but her transportation was, as she herself alleged in paragraph Fourth of her complaint here, on an aircraft 'owned, operated and controlled by the defendant'." * * *

Respondent also argues (respondent's brief, p. 13), "Quite obviously, all of these provisions have reference to the carrier who has actual physical control over the operation of the flight, and not to a person or agency who may have 'made the arrangements' for the transportation."

The prevailing opinion of the Court of Appeals and the respondent completely lose sight, that the provisions of the "Warsaw Convention", deal with the transportation of passengers, involved in "international transportation" and not with the operation and control of planes engaged in "international transportation".

Thus, the fact, that the plane was operated by respondent does not determine the question as to whether the government was performing petitioner's transportation.

Petitioner and others were engaged in a governmental project, rendering entertainment to the United States Armed Forces.

The word *performance* as used in the reservation to the convention should be construed in a broad sense. The government was performing this transportation, just as it would have, if it were transporting military personnel under a charter contract with respondent with no special contract of liability for injury. In such event respond-

ent's obligations for injuries would be measured by the law of the place where the injury occurred and not by the limitation provisions of the "Warsaw Convention".

It is reasonable to assume that reservation by the United States was intended to limit the application of the articles of the convention to private transportation, for, it was a treaty intended to govern the rights of citizens and not the rights of nations. At least, those are the terms under which the United States adhered.

Why then, should this governmental project for transportation connected with the war effort, concerning which those being transported had no knowledge or choice of contract, be said to come within the framework of a compact intended to apply to private citizens having the choice and power to contract freely.

Judge Conway, in his dissenting opinion, deemed the question as one of fact to be determined at a trial. He said (Petition, p. 35):

> * * * "Since the War Department was arranging her transportation to war areas she may have reasonably assumed and may be able to prove that the Government was "performing" the transportation in such a manner that the Convention was inoperative. Defendant's proof is certainly not conclusive that appellant knew or should have known that the War Department had purchased a passenger ticket for her for 'international transportation' on a privately operated commercial airline. The arrangement between the Government and the defendant may well have been such that the Governmen was 'performing' the transportation within the meaning of the reservation to the Convention. That is for the trial."

(C)

The delivery of a ticket to the passenger with the terms of limitation printed thereon, were evidently intended by the framers of the "Warsaw Convention" to give some type of notice to those who were to be bound thereby. The determination of the Court of Appeals destroys the provision for notice.

To say, that a situation like the one at bar is not likely to occur again because the type of transportation involved here, was peculiar to wartime conditions is to ignore the fact that wartime conditions still prevail; that the government transports many thousands in peacetime; that private transportation is continually affected by the delivery provision of the Convention.

There are few questions involving greater public concern, than those presented by the petition at bar.

This petition meets every condition prescribed by Rule 19 of the Supreme Court Rules and is not adversely affected by the decision of this Court in *Evelyn Rice* v. *Sioux City Memorial Park Cemetery, Inc., et al.*, decided May 9, 1955.

CONCLUSION

The petition should be granted.

Dated May 18, 1955.

Respectfully submitted,

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Office - Supreme Court, U. S.
FILED
MAY 17 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 735

JANE FROMAN,

Petitioner,

—against—

PAN AMERICAN AIRWAYS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Petitioner, plaintiff below, seeks a writ of certiorari to review an order of the Court of Appeals of the State of New York, decided April 14, 1949, 299 N. Y. 88, which affirmed an order of the Appellate Division of the Supreme Court, entered June 17, 1948, 274 App. Div. 767, which in turn affirmed an order of the Supreme Court at Special Term, entered in N. Y. County on February 20, 1948, 190 Misc. 974, granting a motion by respondent for summary judgment under Rule 113 of the Rules of Civil Practice, dismissing the first cause of action set forth in the complaint, with leave to amend the same by reducing the amount

of the damages demanded therein to the sum of $8,291.87.

The original complaint, served on September 15, 1944, alleged four causes of action. At that time and until amended on March 2, 1953, the action was entitled *"Ellen Jane Ross, known professionally as Jane Froman, and Donald Ross* v. *Pan American Airways, Inc."* In substance, the first cause of action alleged that petitioner, while riding as a passenger in one of respondent's seaplanes known as the "Yankee Clipper", suffered bodily injuries when the plane crashed near Lisbon, Portugal, on February 22, 1943, and that the accident was caused by the negligence of defendant.

The third cause of action alleged that the accident was due to the "wilful misconduct" of respondent. The second and fourth causes of action sought recovery for loss of baggage in the sum of $10,000 and for medical expenses and for loss of society to the extent of $100,000.

In its answer, respondent pleaded Article 22 of the Warsaw Convention, which limits recovery to $8,291.87 for bodily injuries suffered by a passenger, in the absence of wilful misconduct, and also limits the amount of recovery for lost checked baggage and hand baggage.

Respondent's motion for summary judgment dismissing the first cause of action was made upon the ground that under the provisions of Article 22 petitioner had no cause of action for damages in excess of $8,291.87 in the absence of a plea of wilful misconduct.

Petitioner's principal argument in opposition to the motion was that no ticket had been delivered to her; that under the provisions of Article 3 of the Warsaw Convention, the carrier was therefore not entitled to avail itself of the provisions limiting its liability; and that, therefore, her first cause of action for damages in excess of the limited amount was good despite the lack of a plea of wilful misconduct.

Respondent's affidavits in support of the motion for summary judgment set out copies of the tickets issued in the name of petitioner which called for transportation which was "international" within the meaning of the Convention and which conformed to the requirements of Article 3. The tickets were delivered to a Mr. Saul Abraham of the U. S. O. Camp Shows, Inc. Petitioner submitted her own affidavit in opposition to the motion, stating that it was her understanding that U. S. O. Camp Shows, Inc. had arrangements with the United States Government to supply entertainment for the Armed Forces, that "Mr. Abraham was in charge of all arrangements up to the point of embarkation," and that she had no knowledge of her destination until after boarding the airplane.* She also submitted an affidavit by Abraham,

---

* In her affidavit in opposition to the motion for summary judgment, petitioner stated (Papers on Appeal, p. 39):

> "I received no advance information from either the Government or USO Camp Shows Inc. as to when and where I was to go and by what mode of transportation."

However, during the subsequent trial before Mr. Justice Steuer, she testified as follows (Case on Appeal, p. 196a):

> "Q. As a matter of fact, when was it that you made your arrangement with USO as a result of which you were on this Clipper ship when this accident happened? A. I was playing in a show with Ed Wynn called 'Laugh, Clown, Laugh' when I got a wire asking me to volunteer to go overseas.

which stated that he was in charge of arranging the transportation and that he picked up the tickets. He said that until the day of departure he retained possession of the tickets. On that day, he took all of the performers to the airport, lined them up before desks attended by the respondent's clerks. and placed in front of each one, including the petitioner, his or her ticket and passport. The clerks then tore off the New York-Lisbon stubs and passed the tickets and passports along to desks of customs inspectors, as the performers moved to the same desks. After checking the tickets and passports, the inspectors handed them back to Abraham, who in turn handed all the tickets to the manager of the company as the latter boarded the plane.

After an initial denial of the motion on procedural grounds, Special Term granted the motion on February 28, 1948, dismissing the first cause of action with leave to petitioner to amend by reducing the prayer for damages to $8,291.87. The grounds for the decision were stated to be that Abraham had implied authority to receive the petitioner's ticket, which concededly fulfilled the requirements of Article 3 of the Convention.

Petitioner did not avail herself of the leave to amend the first cause of action. Instead she appealed the decision to the Appellate Division which affirmed without opinion. Petitioner then appealed to the

---

I sent my answer back in about an hour and a half and from that time on I was on call.

* * *

Q. How much of your time in 1943 had you agreed to give on that basis? A. Our tour was to last three months. We were to work in England, all for camps over there, and to get down to North Africa, I believe."

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Court of Appeals which also affirmed in the opinion reported in 299 N. Y. 88 and printed in the Appendix to the petition. The grounds for the affirmance were stated to be that, by boarding the airplane as a traveler on the ticket, petitioner had ratified and adopted what had been done by the Army and later by Abraham, in taking out the ticket in her name. This was so, whether or not Abraham had actual or implied authority to accept delivery of the ticket.

After the passage of several years, the case involving the second, third and fourth causes of action, was tried before Mr. Justice Aron Steuer and a jury in the Supreme Court, New York County (from March 9 to 18, 1953), and, at the conclusion thereof, the jury brought in a verdict for respondent on the issue of wilful misconduct. The court then directed a verdict in favor of petitioner for the limited amounts conceded to be due to her. The judgment entered thereon was unanimously affirmed by the Appellate Division, 284 App. Div. 935. Thereafter, petitioner's motion for leave to appeal to the Court of Appeals was denied by the Appellate Division on January 18, 1955, 285 App. Div. 806, and by the Court of Appeals on February 28, 1955, 308 N. Y. — (not yet reported).

The present petition is restricted specifically to the order of the Court of Appeals dated April 14, 1949, which affirmed the Appellate Division's affirmance of the order of Special Term granting respondent's motion to dismiss the first cause of action.

Petitioner does not attack the validity of the Warsaw Convention, nor does she deny that the transportation involved was "international transportation by air" as defined in the Convention. Her only con-

tentions are (1) that a ticket was not delivered to her as required by Article 3 of the Convention (or that there was at least an issue of fact in this regard), and (2) that the transportation was "performed directly by the state," so that the Convention did not apply.

Warsaw Convention

The pertinent provisions of the Warsaw Convention (49 Stat. 3000 ff.) necessary for consideration of petitioner's application for a writ herein, are contained in Articles 1, 2 and 3, as follows:

"CHAPTER I. SCOPE—DEFINITIONS

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this conven-

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tion. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) * * *.

Article 2

(1) This convention shall apply to transportation performed by the state or by legal entities constituted under public law provided it falls within the conditions laid down in article 1.

(2) * * *.

CHAPTER II. TRANSPORTATION DOCUMENTS

Section I—Passenger Ticket

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

When the Convention was concluded in 1929, it contained an "Additional Protocol" signed by the original High Contracting Parties (which did not then include the United States) reading as follows:

"ADDITIONAL PROTOCOL

With Reference to Article 2

The High Contracting Parties reserve to themselves the right to declare at the time of ratification or of adherence that the first paragraph of article 2 of this convention shall not apply to international transportation by air performed directly by the state, its colonies, protectorates, or mandated territories, or by any other territory under its sovereignty, suzerainty, or authority."

President Roosevelt's proclamation of the adherence of the United States to the Convention in 1934 contains the following language (49 Stat., pt. 2, at page 3013):

"AND WHEREAS the said convention and the said additional protocol have been definitively

adhered to by the United States of America, subject to the reservation, as is provided for in the additional protocol, that the first paragraph of Article 2 of the convention shall not apply to international transportation that may be performed by the United States of America * * *.

* * *

NOW, THEREFORE, be it known that I, Franklin D. Roosevelt, President of the United States of America, have caused the said convention and additional protocol to be made public to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America and the citizens thereof, subject to the reservation aforesaid."

The Additional Protocol, to which the United States adhered and under the terms of which it declared that the Convention should not apply to transportation "performed directly by the state," is not printed by petitioner. Her first paragraph, on page 4 of the petition under the caption "United States Reservation to Article 2(1)", is an inaccurate quotation from the recitals of the proclamation and the remaining paragraphs on pages 4 and 5 of the petition under that caption are extracts from the Convention itself and have nothing whatsoever to do with the United States Reservation to Article 2(1).

ARGUMENT

No federal question of substance is presented by the holdings of the New York Court of Appeals that the transportation was not performed by the United States and that petitioner had ratified the act of her agent in taking delivery of the ticket issued in her name.

There is nothing in the decision of the New York Court of Appeals sought to be reviewed which should impel this Court to grant certiorari. The decision is not in conflict with any decision of this or any other court. The particular circumstances under which the ticket was delivered and the transportation performed were, as the affidavits on the motion show, peculiar to wartime transportation of whole groups and are emphatically not likely to arise in the ordinary course of international air transportation, so that the questions are not of wide public importance. Moreover, there is no substantial federal question presented by the decision, and it is clearly correct.

In the case of *Evelyn Rice* v. *Sioux City Memorial Park Cemetery, Inc., et al.,* No. 28—October Term, 1954, 23 LW 4195, decided May 9, 1955, this Court vacated and dismissed a writ of certiorari as improvidently granted in an opinion delivered by Mr. Justice Frankfurter wherein he said (4196):

> "This Rule, [Supreme Court Rule 19] formulated 30 years ago, embodies the criteria, developed ever since the Evarts Act of 1891, by which the Court determines whether a particular case merits consideration, with due regard to the

proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely confined by the Judiciary Act of 1925. In illustrating the character of reasons which may be deemed 'special and important,' the Rule refers to cases

> 'Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.'

A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (*Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 Sup. Ct. v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Am. Law Inst. 313.) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. * * *

* * * *"

And further at 4197, 4198:

"* * * In the words of Mr. Chief Justice Taft, speaking for a unanimous Court:

> 'If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to

> dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393."

The question of whether the transportation in the case at bar was "performed directly by the State," so as to come within the reservation of the Additional Protocol and the United States reservation is easily disposed of. The original complaint alleged, and the answer admitted, that the airplane was "owned, operated and controlled" by defendant. The tickets, copies of which are attached to the affidavits on the motion, were issued by Pan American Airways. The affidavits submitted by petitioner herself consistently refer to the "Pan-American Airways' Yankee Clipper" and "a Pan-American Airways' clipper". The only suggestion of any connection of the United States with the transportation is the statement in Mr. Abraham's affidavit (Papers on Appeal, p. 43) that he had been notified " * * * that the War Department had made arrangements for the performers to leave New York on a Pan-American Airways' clipper". To say that an agency which arranges for a person's transportation and buys his ticket "performs the transportation" is to do violence to the English language. If there were any doubt, it would be laid to rest by the language of the Convention. Article 1 refers to transportation "performed by air-

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craft for hire," "performed by an air transportation enterprise," and "performed by several successive air carriers." Article 30 refers to "transportation to be performed by various successive carriers" and defines the liability of a carrier with respect to "* * * that part of the transportation which is performed under his supervision." The same Article restricts a passenger's right of action to "* * * the carrier who performed the transportation during which the accident or delay occurred, * * *." Article 34 provides that the Convention shall not apply "* * * to transportation performed in extraordinary circumstances outside the scope of an air carrier's business." Quite obviously, all of these provisions have reference to the carrier who has actual physical control over the operation of the flight, and not to a person or agency who may have "made the arrangements" for the transportation.

Petitioner's other contention is set forth at pages 6 and 7 of the petition, where she states that the first "Question Presented" is whether the provisions of the Convention are applicable to her, "who never contracted for such passage and to whom a ticket was never delivered; but who took passage after a ticket in her name was issued without her knowledge or consent." She states that the Court of Appeals "erroneously interpreted and applied Articles 1 and 3" of the Convention.

Actually, as an examination of the record will show, the question was and is much narrower than that, and the decision of the Court of Appeals hinged not upon any question of whether the Convention was applicable, nor upon any interpretation of the provisions of the Convention, but upon the facts appearing in

the affidavits and the application to those facts of the New York law of agency.

Petitioner did not attack the validity or constitutionality of the Convention below. Nor did she contend that the transportation was not "international" within the definition contained in Article 1.* She apparently does not seek to raise those questions now, despite the wording of her "Questions Presented". In any event, she is foreclosed from raising those questions for the first time on this petition, not having raised them below. *Whitney* v. *California,* 274 U. S. 357, 360; *White River Co.* v. *Arkansas,* 279 U. S. 692, 700.

Petitioner's principal argument in the New York Court of Appeals, as the nature of the questions certified to that court show (Petition, pp. 9, 10), was that Mr. Abraham, who concededly took delivery of her ticket, was not authorized by her to do so, so that no ticket was actually delivered to her as required by Article 3 of the Convention. Had the Court of Appeals accepted this argument, the defendant would have been deprived of the benefits of the limitation provisions of the Convention. The petitioner lost no rights because the Court of Appeals rejected her argument. Under the specific provisions of Article 3 all

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* As a matter of fact, in a prior action brought by the administrator of a passenger killed in the same accident, the Court of Appeals held that the flight was subject to the provisions of the Warsaw Convention, and that the Convention did not conflict with the Federal Constitution. This Court denied certiorari. *Garcia* v. *Pan American Airways, Inc.,* 295 N. Y. 852, cert. denied for want of final judgment, 329 U. S. 741, cert. denied 338 U. S. 824. Similarly, in *Lee* v. *Pan American Airways, Inc.,* 275 App. Div. 855, leave to appeal denied 300 N. Y. 761, the New York courts upheld the constitutionality of the Convention, and this Court denied certiorari, 339 U. S. 920.

of the Convention rules (except those limiting or excluding the carrier's liability), including the presumption of liability in petitioner's favor (Article 17), apply whether or not a ticket is delivered. And, of course, petitioner was still entitled to prove wilful misconduct and thus escape the limitation provisions. That issue was actually tried, and decided against her by the jury.

Petitioner's argument that Abraham was not authorized to accept delivery of her ticket was rejected by the Court of Appeals not on the basis of its interpretation of the word "delivery" as used in the Convention. That Court accepted without question petitioner's construction of the Convention as meaning that the ticket must be delivered to someone authorized by her to accept delivery. It rejected petitioner's argument because, as the opinion states (299 N. Y. at page 96):

> "* * * it can hardly be disputed that, when a ticket bearing appellant's name and all particulars as to the intended route as well as a reference to the Warsaw Convention limitation, was laid in front of appellant on the table in the airport, she, by thereafter boarding the plane as a traveler on that ticket, impliedly, if not expressly, ratified and adopted what had been done by the Army, and later by Abraham, in taking out that ticket in her name.
>
> Thus the special, and undisputed, facts in these affidavits make impossible, as matter of law, any finding other than that the ticket was 'delivered' * * *."

That clearly is not a holding dependent upon the construction of the Convention. It is an analysis of

the particular facts disclosed by the affidavits, and the application to those facts of the New York law of agency. It is significant that the dissenting opinion, upon which petitioner relies, makes no argument that the Convention was wrongly interpreted by the majority; it states only that there were issues of fact which the court should not have decided summarily. And on the crucial point of ratification, which was the crux of the majority opinion, the dissent cites no cases decided under the Convention, and no federal cases, but a single case decided by the New York courts, interpreting New York law, in 1877.

The decision of the Court of Appeals, therefore, is based primarily upon the facts presented on the motion, and upon the legal significance of those facts in New York law. It therefore presents no question which is a proper one for review by this Court. The point is very similar to that presented in the case of *General Pictures Corp.* v. *Western Electric Co.,* 304 U. S. 175. That was a suit to restrain patent infringements. The patents were of course granted by the United States, so that a federal right was directly involved. One of the questions presented in the brief supporting the petition for certiorari, but not in the petition itself, was "* * * whether, by acceptance and retention of royalties paid by the licensed manufacturer, respondents acquiesced in the infringement and are estopped from maintaining the suit." This Court declined to review that question because it was not properly presented in the petition, but it also stated, at page 178:

> "There is nothing in the lower courts' decision on either of the added questions to warrant review here: Whether respondents acquiesced in

the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. *Southern Power Co.* v. *N. C. Public Service Co.,* 263 U. S. 508. *United States* v. *Johnston,* 268 U. S. 220, 227 * * *."

Similarly, in *Southern Power Company* v. *North Carolina Public Service Company,* 263 U. S. 508, this Court had granted a writ of certiorari upon the petitioner's representation that the decree below would deprive it of property without due process. After argument, the Court dismissed the writ as improvidently granted, saying at page 509:

> "The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use—primarily a question of fact. That is not the ground upon which we granted the petition and if sufficiently developed would not have moved us thereto."

The cases cited by petitioner are not to the contrary. In *Burthe* v. *Denis,* 133 U. S. 514, the state court had decreed that an award made under a treaty should be distributed among all the heirs and legatees of the original claimant, American as well as French, although the treaty expressly provided only for claims of French citizens. This Court took jurisdiction and reversed, on the ground that state laws of distribution must give way to the terms of the treaty. Obviously, the construction of the treaty and an apparent conflict with state law was directly involved.

In *Ancient Egyptian Arabic Order* v. *Michaux,* 279 U. S. 737, the petitioning corporation, organized

under an Act of Congress, was enjoined by the state court from certain practices which were found to constitute "fraudulent deception" injurious to the respondent. The state court based its decision in part upon a finding that the respondent was not guilty of laches. This Court held that that finding "* * * not only * * * is without fair support in the evidence, but that the evidence conclusively refutes it," so that the decree deprived the petitioner of a federal right on a non-federal ground of decision which was contrary to the evidence.

In *United States* v. *Pink*, 315 U. S. 203, this Court specifically held that it would not inquire into the propriety of the procedure of the New York court in grounding a motion for summary judgment upon the record in another case, since that "* * * is distinctly a question of state law, on which New York has the last word." The point involved in the *Pink* case, however, depended upon an interpretation of Russian law on which a claim of the United States was based; and as to that, this Court said, at page 218, "While deference will be given to the determination of the state court, its conclusion is not accepted as final."

In *Dyer* v. *Sims*, 341 U. S. 22, this Court expressly stated that the highest court of a state is "the ultimate tribunal in construing the meaning of her Constitution" in the ordinary sense. In that case, however, the question was whether a compact entered into with seven other states was in conflict with the Constitution of one, and, as this Court pointed out at page 28:

> "A State cannot be its own ultimate judge in a controversy with a sister State."

Here the question involved was simply one of the legal significance of undisputed facts under New York law. The holding of the New York court was certainly supported by the evidence. There was no question of the interpretation of the treaty or of any foreign law. The holding of the New York court was not in conflict with any obligation the state had undertaken nor was it in derogation of any federal right owing to the petitioner. Whatever "rights" she may have had under the Warsaw Convention were fully respected on the motion and the subsequent appeals, as well as on the trial and the final judgment. The decision of the New York Court of Appeals contains nothing which this Court should review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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